

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GASPAR RAMIREZ)	
Claimant)	
VS.)	
)	Docket No. 198,826
EXCEL CORPORATION)	
Respondent)	
Self-Insured)	

ORDER

On December 11, 1996, the application of claimant for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Jon L. Frobish on June 21, 1996, came on for oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through his attorney, Chris A. Clements of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, D. Shane Bangerter of Dodge City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

The nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

K.S.A. 44-510e states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

Claimant was awarded a 24 percent permanent partial general disability which was the functional impairment agreed upon by the parties at the time of regular hearing.

Claimant was denied additional work disability based upon the Administrative Law Judge's finding that claimant's work disability was less than the functional impairment. The Administrative Law Judge first found that the 47 percent loss of task performing ability assessed by Dr. Pedro Murati was the more accurate opinion as Dr. Murati was familiar with the various jobs performed at respondent's plant. The Appeals Board finds Dr. Murati's opinion to be persuasive and adopts this opinion as its own.

The Appeals Board must next consider the wage loss component of claimant's work disability computations. Here, claimant was returned to work with the respondent at an accommodated position after the injury. However, respondent discovered during this period of time that claimant had falsified his pre-employment application with regard to a prior workers compensation injury in California. At that time claimant suffered injury to his low back, was provided medical treatment, temporary disability compensation, and received a lump-sum settlement in the case. It is significant that the injury in California has no bearing on the upper extremity injury suffered by claimant in this instance. None of the tasks listed by Dr. Ernest Schlachter and Dr. Murati appear to exceed the 50-pound lifting limitation placed on claimant by the company physician in California in 1990. Therefore, the Appeals Board finds that claimant is entitled to a work disability based upon both the task loss and wage loss prong of K.S.A. 44-510e. In considering claimant's 47 percent loss of task performing ability with the 100 percent loss of wages, as claimant was unemployed at the time of regular hearing, the Appeals Board finds claimant is entitled to a 73.5 percent permanent partial disability as a result of the injuries suffered while employed with respondent.

The Appeals Board awards a work disability in this instance despite claimant's falsification of his pre-employment application and concludes that the employment contract entered into between claimant and respondent did not change the employer/employee relationship with regard to claimant's entitlement to workers compensation benefits. For the employment contract to be void, sufficient for the purpose of denying workers compensation

coverage, claimant's fraud would have had to have a causal relationship to claimant's injury. See White v. Thompson, 181 Kan. 485, 312 P.2d 612 (1957). See also 3 Larson's Workers' Compensation Law § 47.51 (1997). Larson's states that even if the employment contract is illegal, workers compensation benefits would still be allowed. In Cordova v. Spice Merchant & Co., Docket No. 192,123 (December 1997), the Appeals Board found that if the fraud or misrepresentation by a claimant does not have a causal relationship to claimant's injuries, claimant would be entitled to coverage under the Workers Compensation Act.

The Appeals Board did deny work disability benefits in Cordova; however, that was based upon claimant's lack of ability to obtain work post-injury resulting from his illegal alien status rather than because of any connection to his injuries.

The Court of Appeals has dealt with circumstances wherein claimants, through their own post-injury actions, directly affected their entitlement to work disability. In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the claimant was denied a work disability under K.S.A. 1988 Supp. 44-510e(a) when the Court of Appeals found that to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be against public policy where the proffered job is within the worker's ability and the worker has refused to even attempt the job.

In Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, ___ P.2d ___ (1997), a case utilizing the present version of K.S.A. 44-510e(a), the Court of Appeals held that, in order to harmonize K.S.A. 44-510e(a) with the principles set forth in Foulk, the fact finder must decide whether a claimant has made a good faith effort to find appropriate post-injury employment. If a finding of a good faith effort is made then the difference in pre- and post-injury wages can be based upon the actual wages, if any, earned by the claimant after the injury. However, if a good faith effort has not been made to find appropriate employment, then the fact finder is directed to determine an appropriate post-injury wage, based upon all the evidence, including expert testimony, and to impute that wage earning ability to claimant's work disability under K.S.A. 44-510e(a).

The Appeals Board finds that neither Foulk nor Copeland apply to this scenario. In both Foulk and Copeland the improper actions of the claimant occurred after claimant suffered an injury arising out of and in the course of his or her employment with respondent. In this instance, the improper actions of claimant occurred at the time claimant applied for work with respondent. This was prior to the date claimant suffered his accidental injury. In addition, Foulk does not apply to this circumstance as claimant has not refused post-injury employment but is instead out of work as a result of his pre-injury actions. Copeland also does not apply here as claimant made a good faith effort to find work after the injury. Therefore, the holding in Copeland does not apply in this instance. The Appeals Board, therefore, finds that neither Foulk nor Copeland can be the basis for a denial of work disability to this claimant.

AWARD

WHEREFORE, the Appeals Board finds that the Award of Administrative Law Judge Jon L. Frobish dated June 21, 1996, should be, and is hereby, modified and an award is granted in favor of claimant, Gaspar Ramirez, and against the respondent, Excel Corporation, a qualified self-insured, for an accidental injury sustained on February 20, 1995, for a 73.5% permanent partial disability to the body as a whole.

Claimant is entitled to 305.03 weeks permanent partial disability compensation at the rate of \$307.28 per week for a total award of \$93,729.62. As of December 17, 1997, claimant would be entitled to 147.43 weeks permanent partial disability compensation at the rate of \$307.28 in the amount of \$45,302.29. Thereafter, claimant is entitled to 157.60 weeks permanent partial disability compensation at the rate of \$307.28 in the sum of \$48,427.33 until fully paid or until further order of the Director.

Pursuant to K.S.A. 44-536 claimant's contract of employment with counsel is affirmed insofar as it is not in contravention to the statute.

The fees necessary to defray the expense of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	\$ 71.00
Deposition of Jim Maher	\$525.50
Deposition of Duane Clark	\$168.00
Deposition of Gaspar Ramirez	\$430.00
Barber & Assoc.	
Deposition of Pedro A. Murati, M.D.	\$136.50
Ireland Court Reporting	
Deposition of Ernest R. Schlachter, M.D.	\$143.40

IT IS SO ORDERED.

Dated this ____ day of January 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

The undersigned respectfully dissents from the opinion of the majority.

In the instant case, the Administrative Law Judge found claimant to have suffered no wage loss resulting from this injury. Claimant had been returned to work by respondent at a comparable wage at an accommodated job. It was subsequently discovered that claimant had falsified his employment application with regard to a prior workers compensation injury in California.

The employee handbook provided by respondent, a copy of which was provided to all employees in either English or Spanish, was placed into evidence. In addition, the claimant's application for employment was placed into evidence. In the application, questions regarding prior problems with claimant's neck or back, prior medical examinations, prior medical restrictions, lost time in the last two years because of illness or injury, and questions dealing with consultations with physicians were all answered in the negative. This information was contradicted by evidence provided from California showing claimant had suffered a 1992 injury to his back which resulted in several months of medical treatment, temporary total disability compensation, and a lump-sum settlement in the amount of approximately \$4,600.

Claimant received medical treatment from several doctors with ongoing chiropractic care after his release from the authorized treating physician. Claimant was provided a 50-pound lifting restriction at the time of his return to work by the company physician in California in 1990. This evidence directly contradicts several of the answers provided by claimant at the time of his hire.

The testimony of Jim Maher, the human resources manager for respondent, coupled with the information in the employee handbook, verifies that falsification of an application may result in termination of employment if found to be significant.

The Administrative Law Judge, citing Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), found claimant to have suffered no loss of ability to earn wages in this instance as the termination of his employment resulted from his own preinjury actions in falsifying the application. The Administrative Law Judge then averaged claimant's 47 percent task loss with a zero percent wage loss, computing a 23.5 percent work disability. As this amount was less than the claimant's percentage of functional impairment, the Administrative Law Judge awarded claimant the 24 percent permanent partial general disability which had been stipulated to by the parties.

The Appeals Board, while not considering this exact fact scenario, has considered situations similar to this in the past. In Ortiz v. Nies Construction, Inc., Docket No. 199,812 (August 1997), the Appeals Board was asked to consider whether a claimant, in the United States illegally, was entitled to a work disability. The Administrative Law Judge in Ortiz found that as the claimant was not eligible to return to work for respondent or any other employer in the United States as a result of his illegal employment status that “to award claimant a work disability under these circumstances would be a violation of public policy.” The Appeals Board, in affirming the Administrative Law Judge, cited Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), as authority and concluded that claimant’s illegal status should not be a benefit to him and a burden on his former employer. The Appeals Board then imputed a comparable wage to claimant and, as provided in K.S.A. 44-510e, limited claimant to his functional impairment.

In Cano v. Andy Mackey Painting, Docket No. 202,489 (March 1997), the Appeals Board was asked to consider whether claimant was entitled to work disability after returning to work for respondent and missing numerous days for a multitude of reasons. Claimant was then terminated as a result of his poor attendance. The Appeals Board, citing Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991), found that claimant, returned to work with respondent and later terminated after missing a multitude of work days, had failed to show a good faith effort in his return to employment with the respondent and was not entitled to work disability. In Cano as in Ortiz, the claimant was limited to his functional impairment.

Here, the circumstance is slightly different in that claimant was returned to work at an accommodated position at a comparable wage and lost his job as a result of preinjury actions on claimant’s part. While it is acknowledged that the medical evidence supports a finding that claimant has suffered a loss of task performing abilities, it would be inappropriate for claimant to be awarded a work disability based upon his loss of wages when respondent put forth the effort to return claimant to work at an accommodated position and claimant’s loss of employment resulted purely from his own actions, i.e., the falsification of his employment application at the time of hire. The Administrative Law Judge, in denying claimant one prong of a work disability based upon his loss of wages, found that this loss was the result of the employee’s prior misconduct and not related in any way to his work-related injury. This Appeals Board Member would affirm the Award of 24 percent permanent partial disability based upon claimant’s functional impairment and deny claimant work disability for the above reasons.

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
D. Shane Bangerter, Dodge City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director